

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**  
One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 727-2293

CATHERINE VIEIRA,  
Appellant

G2-14-181

v.

DEPARTMENT OF REVENUE,  
Respondent

Appearance for Appellant:

*Pro Se*  
Catherine Vieira

Appearance for Respondent:

Elizabeth M. Sullivan, Esq.  
Department of Revenue  
100 Cambridge Street  
P.O. Box 9553  
Boston, MA 02114

Commissioner:

Christopher C. Bowman

**ORDER OF DISMISSAL**

On July 21, 2014, the Appellant, Catherine Vieira (Ms. Vieira), filed an appeal with the Civil Service Commission (Commission), contesting her non-selection by the Department of Revenue (DOR) to the position of provisional Tax Examiner III (TE III).

On August 19, 2014, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. Vieira and counsel for DOR. Based on the documents submitted and the statements of the parties, it is undisputed that:

1. Ms. Vieira has permanency as a Tax Examiner I (TE I), but currently serves as a provisional Tax Examiner II (TE II) at DOR.
2. In or around December 2013 and January 2014, DOR posted two (2) TE III positions. The positions were posted as provisional appointments (as opposed to promotions).
3. The positions were posted both internally and externally.

4. DOR considered dozens of external and internal candidates for the positions. Candidates were interviewed by members of an interview panel who rated and ranked the candidates based on several job-related criteria.
5. Based on the rankings of the candidates, DOR ultimately made two (2) provisional appointments to candidates serving as provisional TE IIs who have no civil service permanency in any position.

### *Analysis*

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over fifteen (15) years. These provisional appointments and promotions have been used as there have been no “eligible lists” from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the Personnel Administrator’s (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiav v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Foster v. Department of Transitional Assistance, 23 MCSR 528; Heath v. Department of Transitional Assistance, 23 MCSR 548.

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional *promotions*, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and “sound and sufficient” reasons are submitted and approved by the administrator for making such an appointment.
- Under Section 15 of Chapter 31, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which

she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.

- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional “promotion” over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Applied to the instant appeal, DOR has not violated any civil service law or rule regarding provisional appointments. DOR posted these TE III vacancies as provisional appointments and, as such, was not required to appoint candidates with civil service permanency. They were permitted to consider both external candidates as well as internal candidates with no civil service permanency, as they did here.

Ultimately, DOR provisionally appointed two (2) individuals to the position of TE III who served as provisional TE IIs and had no civil service permanency in any title.

Further, Ms. Vieira, as part of the pre-hearing conference was unable to cite any personal or political bias on behalf of anyone involved in the selection process.

DOR filed a Motion to Dismiss Ms. Vieira’s appeal and Ms. Vieira did not file a reply.

### *Conclusion*

For the reasons stated in DOR’s Motion to Dismiss, including the reasons stated in this decision, Ms. Vieira’s appeal under Docket No. G2-14-181 is hereby ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on October 2, 2014.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Catherine Vieira (Appellant)

Elizabeth M. Sullivan, Esq. (for Respondent)

John Marra, Esq. (HRD)